

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**KATY DIERKS,  
RESPONDENT**

**vs.**

**KRAFT FOODS a/k/a ADAIR FOODS COMPANY, and TREASURER OF THE STATE  
OF MISSOURI – CUSTODIAN OF THE SECOND INJURY FUND,  
APPELLANT**

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DOCKET NUMBER WD77893 (Consolidated with WD77895)

DATE: JULY 14, 2015

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Appeal from:

Labor and Industrial Relations Commission

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Appellate Judges:

Before Division Four: Alok Ahuja, Chief Judge, Joseph M. Ellis, Judge and Marco A. Roldan, Special Judge

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Attorneys:

Joshua P. Perkins, for Respondent

Maggie M. Ahrens, for Appellant

Richard L. Montgomery, Co-counsel for Appellant

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**MISSOURI APPELLATE COURT OPINION SUMMARY**

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**v.**

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OF MISSOURI – CUSTODIAN OF THE SECOND INJURY FUND, APPELLANT**

WD77893 (Consolidated with WD77895)

Labor and Industrial Relations

Before Division Four Judges: Alok Ahuja, C.J., Joseph M. Ellis, J. and Marco A. Roldan, Sp. J.

Kraft Foods ("Employer") and the Second Injury Fund ("the Fund") separately appeal an award of the Labor and Industrial Relations Commission awarding benefits to Katy Dierks. The Commission's award ordered Employer to pay past medical, future medical, and permanent partial disability benefits to Dierks, and it found the Fund liable for permanent total disability benefits. This case involved a trip-and-fall work accident in which Dierks's left knee, which had some pre-existing degenerative arthritis present, was injured.

**AFFIRMED.**

**Division Four holds:**

(1) The Commission's finding that Dierks's work accident was the prevailing cause of her meniscus tear and any disability resulting therefrom was supported by substantial and competent evidence. Dierks testified that her left knee was asymptomatic prior to her fall at work, and nothing in the record indicates that she had any problems with the use of her left knee prior to that fall. In addition, her orthopedic surgeon testified that, based upon her history and what he saw of the tearing of the meniscus when performing the surgery, in his opinion, Dierks's fall at work was the prevailing factor in causing her torn meniscus and her need for surgery. Similarly, a doctor performing an independent medical evaluation testified that the meniscus tear was a new structural injury caused by her fall at work and that her fall was the prevailing factor in causing her need for surgery and permanent injury to her knee.

(2) While Employer points to testimony that could have supported a finding the contrary, this Court must defer to the Commission on matters of credibility and the weight afforded to the evidence. Where the right to compensation depends upon which of two conflicting medical theories should be accepted, the issue is peculiarly for the Commission's determination.

(3) A claimant can receive an award of future medical benefits if a work injury aggravates a pre-existing condition to the point that the claimant is likely to need future care. In this case, Dr. Koprivica testified to a reasonable degree of medical certainty that the new structural injury to Dierks's knee from the work injury and the arthroscopic surgery to treat that injury have accelerated the degenerative process to where Dierks will require knee replacement in the future. The Commission was not required to accept as credible or afford weight to the testimony of doctors offering a contrary opinion. The record contained competent and substantial evidence to support the Commission's award of future medical benefits.

(4) The physician chosen by employer erroneously told Dierks her cartilage tear was not work related and that her work injury had completely healed. Accordingly, when she sought to have her knee surgically repaired by her own orthopedist, Dierks had no reason to believe that employer should be responsible for providing that medical treatment. Where an employee seeks necessary medical treatment for a work-related condition without knowledge at the time of that treatment that the condition was work-related and the employer is not prejudiced by such treatment, the employer is required to reimburse the employee for such treatment under § 287.140.1 even though the employer did not have the opportunity to select the treatment providers as granted by § 287.140.10. Absent any evidence that Employer was prejudiced, the Commission did not err in awarding past medical expense to Dierks.

(5) The Commission's finding that the condition of Dierks's right knee was a hindrance or obstacle to employment or reemployment prior to her work accident was supported by substantial and competent evidence. Evidence supported the Commission's findings that Dierks had continued to experience pain in her right knee following surgery on that knee in 2005 to repair osteoarthritis related damage and that she had taken Aleve for such pain. The medical testimony further supported the Commission's finding that the condition of that knee had worsened in the years following the surgery as a result of the osteoarthritis in that knee. Dr. Cohen testified that based on the condition of Dierks's right knee prior to her work injury, he would have placed various restrictions on her work activities and that the condition of her right knee constituted a hindrance or obstacle to her employment or re-employment prior to the work-related injury to her left knee. He testified that she had a permanent partial disability of forty percent at the level of the knee.

(6) While the Fund relies extensively on Dierks's testimony that she had been able to perform her job duties without difficulty prior to her left knee injury, that evidence, even if accepted as credible, does not establish that the Commission's award was against the weight of the evidence. The fact that a person has managed to perform various work duties does not preclude the fact that they have a permanent partial disability. That a worker successfully continues to

physically perform a task does not somehow disprove the validity of a doctor's restrictions. Furthermore, the record reflects that Dierks's job did not require the performance of some of the activities Dr. Cohen would have restricted her from performing. Thus, her performance of her job duties for Employer could not disprove the validity of those restrictions and the fact that her knee would be a hindrance to her ability to obtain and perform certain jobs in the open labor market.

(7) The Commission's finding that Dierks was unemployable in the open labor market and, therefore, permanently and totally disabled "due to a combination of the permanent restrictions place on her left and right knee and overall level of functioning" was supported by substantial and competent evidence. Employability is a matter within the Commission's expertise. The Commission could reasonably have found that the disability to Dierks's left knee related to the work injury, when combined with her preexisting arthritis, sleep apnea, and obesity, rendered her unemployable on the open labor market.

Opinion by Joseph M. Ellis, Judge

Date: JULY 14, 2015

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